(4)

No. 09-430

Supreme Court, U.S.
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In The
Supreme Court of the United States

RAKESH WAHI,

Petitioner,

v.

CHARLESTON AREA MEDICAL CENTER, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REDACTED
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether Petitioner has presented compelling reasons to grant the Petition.

PARTIES TO PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, Rakesh Wahi, was the plaintiff-appellant in the court below.

Respondents, Charleston Area Medical Center, Inc. ("CAMC"), and Glenn Crotty ("Crotty") were defendants/appellees below.

Pursuant to Supreme Court Rule 29.6, Respondent CAMC makes the following disclosures:

CAMC is a West Virginia nonstock, nonprofit corporation. As a nonstock corporation, CAMC has no owner. However, it is a subsidiary of CAMC Health System, Inc. ("CAMCHS") by virtue of its Articles of Incorporation and Bylaws naming CAMCHS as its sole Voting Member.

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INTRODUCTION

Petitioner, Wahi, seeks review of the Fourth Circuit's unanimous decision affirming the district court's award of summary judgment to the Respondents on the question of HCQIA immunity. However, Wahi presents no "compelling reasons" for his Petition for Writ of *Certiorari* ("Petition") to be granted. *See* Sup. Ct. R. 10. In an attempt to establish compelling reasons, Wahi contends that the Fourth Circuit's April 10, 2009, Opinion ("Opinion") creates conflicts between the circuits. Wahi's arguments are flawed, and the claimed conflicts do not exist.

First, Wahi contends that the Opinion, by affirming summary judgment without "the statutorily required possibility of imminent danger," is in conflict with decisions in four other circuits. (Pet. at 1). Wahi mischaracterizes the Opinion and the cited decisions. The Opinion does not challenge the holdings of other circuits that a possibility of "imminent danger" must be present before a professional review action can enjoy immunity under § 11112(c)(2). Rather, the Opinion holds that the requirements of subsection (c)(2) need not be satisfied here because the Respondents are entitled to immunity for having complied with the reasonableness requirements of 11112(a). *Wahi v. CAMC*, 562 F.3d 599, 608 (4th Cir. 2009). Additionally, the circuit decisions cited by Wahi do not hold, as Wahi advances, that every summary suspension must be analyzed under the "imminent danger" standard of § 11112(c) as opposed to the reasonableness standards of § 11112(a), as was done

here. Thus, the Opinion creates no conflict by finding immunity under subsection (a), or by declining to apply subsection (c)(2).

Next, Wahi argues that the Opinion "deepens a pre-existing and acknowledged split involving an [sic] HCQIA plaintiff's access to a jury." (Pet. at 26). This simply is not so. The only "split" that arguably exists between the circuits regarding the "availability of jury trials" relates to who acts as the fact-finder *at trial* on the issue of immunity, judge or jury, if material disputed facts exist which preclude summary judgment.[1] Given its holding that summary judgment was correctly granted, the Opinion did not reach this issue.

Wahi's claim that the Opinion "effectively denies all HCQIA plaintiffs a jury trial" on the issue of immunity, is discredited by a simple reading of the Opinion. (Pet. at 26). The Fourth Circuit applied the same well-settled test that has been uniformly employed by the other circuits when considering whether summary judgment is warranted on the question of HCQIA immunity under § 11112(a). In applying that test, the Fourth Circuit determined that Wahi failed to present sufficient evidence to allow a reasonable jury to find that the Respondents did not provide him with fair procedures under the circumstances. The Opinion does not hold, or even suggest, that a jury trial on the issue of immunity would never be available.

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[1] *See Bryan v. James E. Holmes Regional Med. Ctr.*, 33 F.3d 1318, 1332-1333 (1194) and *Singh v. Blue Cross/Blue Shield of Mass., Inc.*, 308 F.3d 25, 33-35 (2002)

Finally, Wahi argues that this case "would be suitable for summary reversal" because "respondent [sic] concedes that it suspended Petitioner 'without a prior finding that he posed an imminent danger.'" (Pet. at 2). The Respondents make no such concession. Rather, Respondents argue, having demonstrated entitlement to immunity under § 11112(a), they need not even allege satisfaction of the "imminent danger" element of § 11112(c)(2). *Wahi*, 562 F.3d at 608. However, as the facts conclusively demonstrate that failing to suspend Wahi's medical staff privileges may have resulted in an "imminent danger" to patients, the Respondents submit that they are also entitled to summary judgment on the question of immunity under a proper § 11112(c)(2) analysis.

Wahi has failed to demonstrate compelling reasons to grant the Petition. The circuits have harmoniously applied the same legal test to the consideration of whether a defendant is entitled to HCQIA immunity as a matter of law for having complied with the reasonableness requirements of § 11112(a). That well-settled test was employed by the Fourth Circuit here. Wahi's Petition offers only a strained argument that the Fourth Circuit misapplied this test. Therefore, the Petition should be denied.

STATEMENT OF THE CASE

Statement of Facts

Wahi is far from the "excellent" physician portrayed in the Petition. Wahi first obtained privileges from CAMC in 1993. By early 1995, [redacted].[2] Upon investigation, Wahi's practices [redacted]. (JA 497-506), BIO 1a-14a. Those early findings led to ***Wahi's decision to*** [redacted]. (JA 509-510).

After [redacted], Wahi reapplied for privileges. (JA 511-515). On February 6, 1997, CAMC, while under no obligation to provide Wahi any privileges, granted him temporary, limited privileges [redacted]

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[2] The original sources of the complaints against Wahi were not hospital administrators, members of the Medical Staff administration, or competing cardiovascular surgeons. Rather, they were the [redacted]. (JA 497-506).

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. (JA 516-33).

. (JA 517). At that time,

(JA 518, 519-22).

. (JA 527-31).

On February 26, 1999,

. (JA 532-71).

. At a meeting on July 6, 1999,

. (JA 572-73).

On July 13, 1999,

. (JA 574).

. (JA 578-81).

. (JA 582-85).[3]

(JA 611).

[3] A device inserted to "catch" clots and prevent them from being pumped into the lungs (pulmonary emboli). It is inserted through the jugular vein and is then deployed much like an umbrella opens

(JA 584)

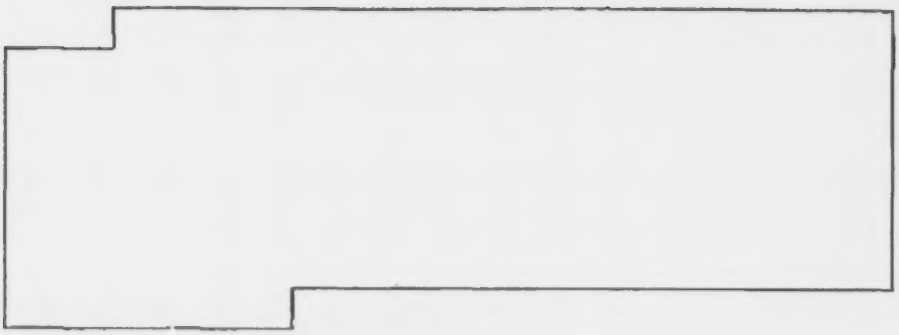
(JA 608).

. (JA 612-13).

.

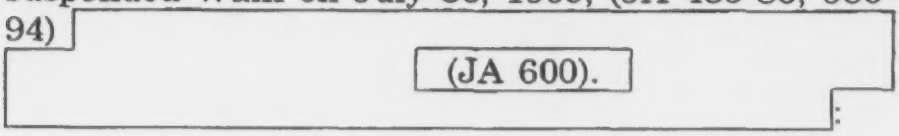
(JA 630).

(JA 632-33).

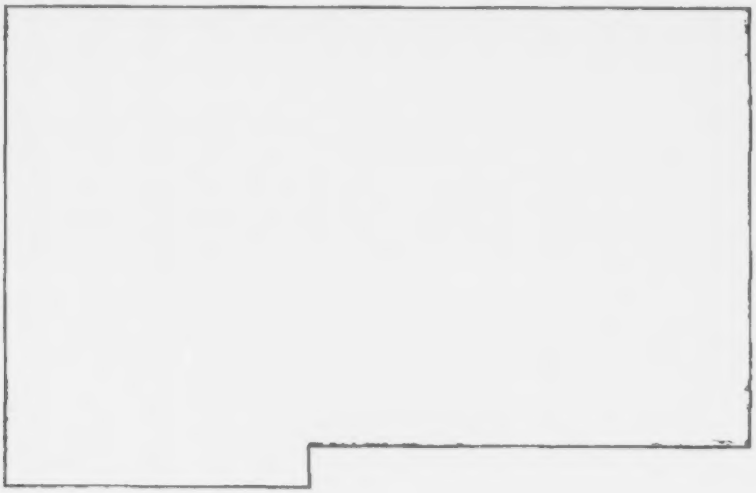


(JA 639) (emphasis added).

With this background, [redacted] summarily suspended Wahi on July 30, 1999, (JA 485-86, 586-94)

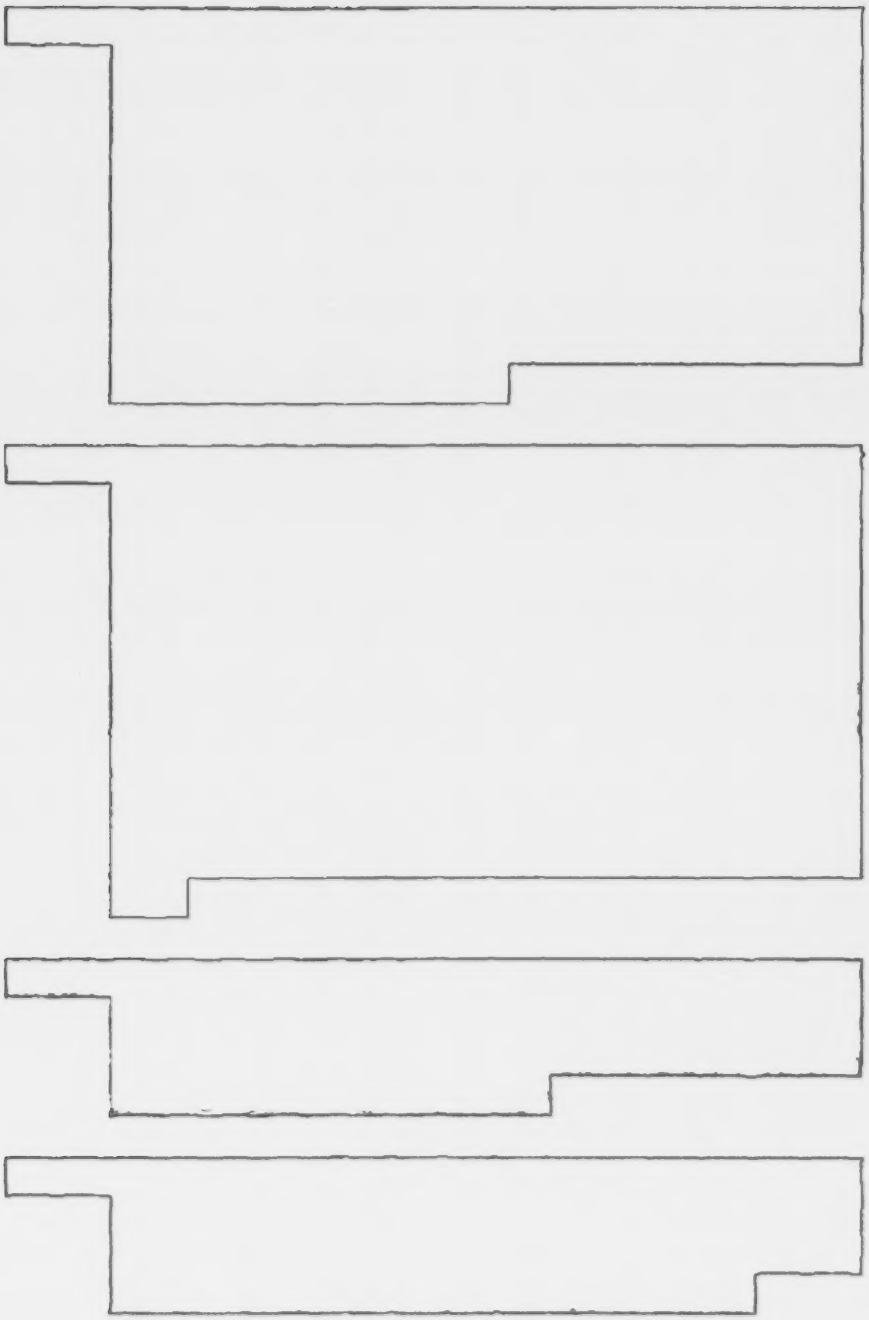


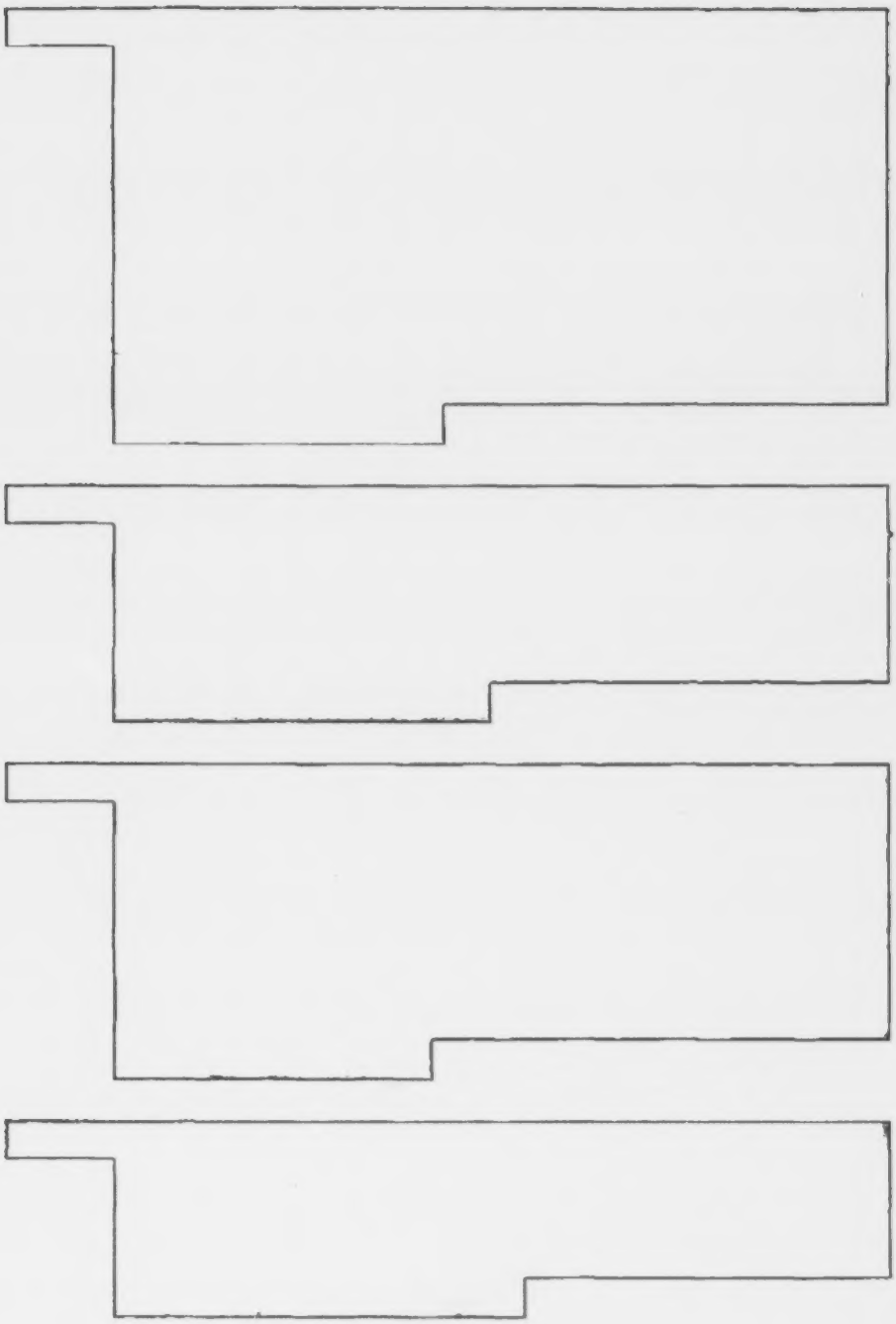
(JA 600).

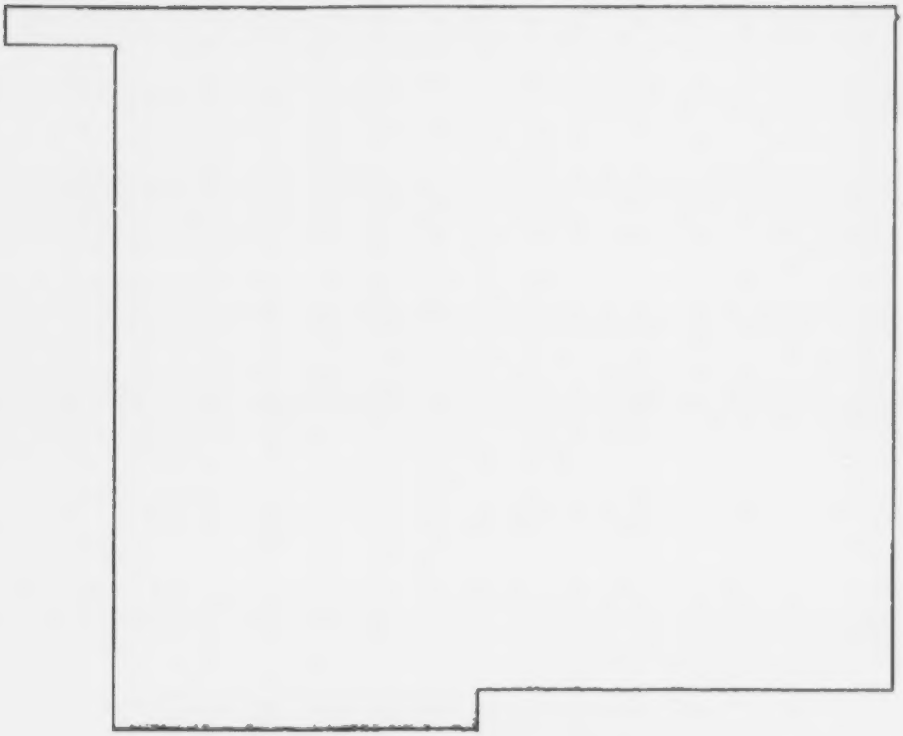


(JA 604-5).

The following events occurred in the weeks leading up to Wahi's suspension:







Brief Statement of Procedure

In the district court, Wahi asserted multiple claims, all of which were correctly addressed by the district court's order granting summary judgment. On appeal, Wahi abandoned many of his claims and focused largely on the question of HCQIA immunity. With respect to immunity, he relied primarily on the argument that summary judgment was not appropriate because no hearing had been held following his suspension.[4]

In addressing the district court's award of summary judgment on HCQIA immunity pursuant

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[4] A detailed procedural history of the case is laid out accurately in the Opinion.

to 11112(a), the Fourth Circuit noted that Wahi failed to raise any argument to support his claim that the first, second, and fourth prongs of subsection (a) were not met by the Respondents and concluded that Wahi "waived his claims" as to these subsections of the § 11112(a) HCQIA immunity test. Accordingly, the Fourth Circuit's review regarding immunity was limited to whether "the district court erred in determining that Wahi did not overcome the presumption that CAMC satisfied the requirements of subsection (a)(3)." *Wahi*, 562 F.3d at 607.

REASONS FOR DENYING PETITION

Brief Statement of Applicable Law

Congress enacted the Health Care Quality Improvement Act "to improve the quality of medical care by encouraging physicians to identify and discipline other physicians who are incompetent or who engage in unprofessional behavior." H.R.Rep. No. 903, 99th Cong., 2d Sess. 2 (1986) *reprinted in* 1986 U.S.C.C.A.N. 6287, 6384. Congressional findings, recited in the statute, provide that "[t]he increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State," and that these problems "can be remedied through effective professional peer review." 42 U.S.C. § 11101(1), (3) (2009). To further this goal, HCQIA provides immunity from money damages in suits brought by disciplined physicians against peer review participants. 42 U.S.C. § 11111(a) (2009). The immunity is designed to facilitate frank peer

review by eliminating the fear of reprisals in civil lawsuits.

Prior to the passage of HCQIA, vigorous peer review was discouraged by the looming specter of litigation. Congress found that "[t]he threat of private money damage liability under [state and] Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review." § 11101(4). Accordingly, HCQIA provides that peer review participants meeting certain fairness requirements shall not be liable under any state or federal law for damages. § 11111(a)(1).

HCQIA also requires health care entities to report disciplinary actions to a national clearinghouse established to collect and disseminate information on health care providers. §§ 11133-34. The Act then requires a hospital to obtain a physician's records from the clearinghouse prior to granting medical staff privileges. § 11135. These reporting requirements "restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance." § 11101(2). Congress recognized that troubled physicians, now unable to hide their problems, would likely challenge peer review actions in the courts. *See* H.R. Rep. 99-903, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 6385. The reporting requirements, therefore, heightened even further the need to protect peer review participants from civil damages.

For purpose of the immunity protection set forth in § 11111(a), a professional review action must be taken --

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) **after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances,** and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

§ 11112(a) (emphasis added).

Importantly, HCQIA creates a rebuttable presumption of immunity: "A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in § 11111(a) of this title *unless the presumption is rebutted by a preponderance of the evidence.*" §§ 11112(a), (a)(4) (emphasis added). Additionally, HCQIA expressly provides that "nothing in [§ 11112] shall be construed as -- precluding an immediate suspension or restriction of clinical privileges,

subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual." §§ 11112(c), (c)(2).

Argument

I. The Fourth Circuit's Opinion Correctly Applied Established Law and Does Not Create a Conflict with Decisions of the Third, Fifth, Eighth, and Ninth Circuits.

Wahi contends that the Opinion conflicts with four other circuits because it failed to apply a § 11112(c)(2) analysis. This argument lacks merit. The Opinion correctly holds that subsection (c) need not be addressed here because the Respondents are entitled to immunity for having complied with the reasonableness requirements of § 11112(a). *Wahi*, 562 F.3d at 614. This well-reasoned decision is consistent with the plain language and clear intent of HCQIA and does not conflict with any holding of a sister circuit.

A. The Possibility of "Imminent Danger" is Not Required for Entitlement to HCQIA Immunity Under § 11112(a), and the Fourth Circuit Did Not Err by Declining to Conduct a § 11112(c)(2) Analysis

As pointed out by the Fourth Circuit, the Respondents have never sought immunity under the "health emergencies" provision of § 11112(c)(2). Rather, the Respondents claim immunity for having

afforded Wahi reasonable procedures as set forth in § 11112(a)(1)-(4). Both the district court and the Fourth Circuit agreed that the Respondents satisfied the requirements of subsection (a) and, therefore, did not even consider whether immunity was proper under subsection (c)(2).

Wahi's Petition is built upon the false premise that his suspension must be treated as "immediate" within the meaning of § 11112(c)(2), having been handed down, he argues, before fair procedures were afforded him. Wahi recklessly argues that the Fourth Circuit "conceded" that he "was suspended immediately" and "held that the hospital could ignore the 'imminent danger' requirement and still obtain immunity if it *later* 'me[t] the usual standard' of providing notice and a hearing or other fair procedures." (Pet. at 1). This is a funhouse mirror reading of the Opinion, which clearly holds that fair procedures were provided to Wahi both *before* and after his suspension.

Having rewritten the Opinion, and having completely mischaracterized its reasoning, Wahi then pronounces it "indefensible" and "obviously flawed." (Pet. at 2). Wahi's indictment continues: "In other words, under the decision below, a doctor can be immediately suspended – without any 'imminent danger' – so long as the hospital provides some procedures at some point." (Pet. at 1-2). This is simply not what the Fourth Circuit held. Indeed, the Opinion expressly recognizes that "[u]nder subsection (a)(3), a health care entity seeking HCQIA immunity must act 'after adequate notice and hearing procedures are afforded to the physician

involved *or* after such other procedures as are fair to the physician under the circumstances.'" *Wahi* at 608 (citing 42 U.S.C. § 11112(a)(3)) (emphasis by italics in original, emphasis by underline added).

Wahi also ignores the Opinion's detailed discussion of the facts leading up to his July 30, 1999, suspension, including that:

- Information was received as early as July 8, 1999, that Wahi had performed a surgical procedure not permitted under the terms of his provisional privileges and that he had failed to notify CAMC, as required by the Bylaws, that he had voluntarily relinquished his privileges at another hospital. *Wahi*, 562 F.3d at 602;

- The Credentials Committee thereafter prompted an investigation into these charges. *Id.*;

- By letter dated July 16, Wahi was informed of the charges and the investigation, was asked to respond to each charge in writing as soon as possible, and was provided the relevant Bylaws pertaining to the charges. *Id.* at 603;

- Wahi apparently learned of the allegation that he had performed an unauthorized surgery prior to July 15, because on that date he wrote [redacted] explaining his decision to perform the procedure and why he believed it fell within his privileges. *Id.* at 610;

- Between July 16 and July 30, Wahi met with [redacted] to discuss the charges, and additional information needed to consider his responses, and wrote to the Credentials Committee Chairman to provide his side of the story. *Id.* at 603;

- Between July 16 and July 30, "Wahi wrote to [redacted] and [redacted] several times, addressing the charges in writing, and providing documents supporting his position that he had not violated the conditions of his clinical privileges." *Id.* at 610.

Thus, the Opinion concludes: **"The record shows that CAMC provided Wahi with notice of the most recent allegations against him, and an opportunity to respond to those allegations."** *Id.* (emphasis added). It was not until July 30, after Wahi had been provided with notice and an opportunity to respond, that his privileges were suspended for the "best interest of patient care."[5] The Fourth Circuit in no way conceded, as Wahi asserts, that he was afforded fair procedures *only after* his suspension.

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[5] The Fourth Circuit also engaged in a detailed discussion and analysis of the facts subsequent to Wahi's July 30, 1999, suspension. This was prompted at least in part by Wahi's primary argument on appeal that CAMC could not qualify for immunity because it **never** provided him with a hearing. Given that posture on appeal, the Fourth Circuit correctly looked at and considered all of the procedures and activities surrounding the July 30, 1999, suspension and determined that all of the procedures afforded, both before and after the suspension, were fair under the circumstances.

The Petition also presumes that no summary suspension can possibly satisfy the other fair procedures prong of § 11112(a)(3). No support for this position is found in HCQIA, and no court has ever held this to be so. Further, Wahi's argument is illogical. The determination of whether a peer review action is taken after fair procedures have been afforded must be based upon the facts. Because a suspension is handed down summarily does not mean that the suspension was taken without "other fair procedures" having been first afforded. The present case proves the point. It is undisputed that CAMC received complaints, investigated the complaints, and provided Wahi with notice of the complaints and an opportunity to respond before suspending him. Thus, the Fourth Circuit's holding that Wahi's suspension was taken after fair procedures had been afforded is well supported. Wahi simply ignores this clearly articulated basis for the Opinion.[6]

Having qualified for immunity under subsection (a), the question of whether Respondents also qualify for immunity under subsection (c) is of no consequence. This is precisely the reasoning the Fourth Circuit used to reach its conclusion that the "imminent danger" element of subsection (c)(2) was not implicated here:

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[6] Respondents submit that the district court and Fourth Circuit had no difficulty reading and understanding the language of subsection (a)(3) – and that the Opinion clearly and correctly holds that Wahi was provided fair procedures before being suspended. Ironically, in an effort to paint the Opinion as "rewriting" HCQIA, the Petitioner decidedly rewrites the Opinion.

> Subsection (c) . . . sets out distinct ways in which a health care entity can be immune under the HCQIA without having complied with the usual requirements for claiming immunity. Wahi would have us read the statute by ignoring this clear purpose and instead find that the HCQIA immunity is barred by failing to meet one of the subsection (c) prongs. To the contrary, subsection (c) presents additional routes to HCQIA immunity beyond that set forth in subsection (a)(3).

Wahi, 562 F.3d at 608. This reasoning is sound, consistent with both the letter and spirit of HCQIA, and creates no conflict with the decision of another court.

B. The Opinion Does Not Create a Conflict with the Decisions of Other Circuits

Wahi's argument that a summary suspension, by definition, cannot satisfy the "fair procedures" element of (a)(3) is unsupported by the language of HCQIA and finds no support in the case law. The courts considering immunity in this context have consistently looked to the facts to determine whether immunity is proper under subsection (a) or (c), or both. A review of the four circuit decisions Wahi *incorrectly* claims are in conflict with the Opinion illustrates the point.

Poliner v. Texas Health Systems

The *Poliner* court confronted an appeal from a judgment in favor of the plaintiff, following a jury trial. The question on appeal was whether the temporary restrictions of privileges handed down during an investigation of Dr. Poliner enjoyed HCQIA immunity as a matter of law. *Poliner v. Texas Health Systems*, 537 F.3d 368, 369 (5th Cir. 2008). The *Poliner* decision reversed and rendered judgment for the defendants, holding that they were immune from money damages as a matter of law. *Id.* at 370.

Temporary restrictions were imposed on Poliner after questions were raised regarding his treatment of "Patient 36," who presented to the emergency room on May 12, 1998, suffering from a heart attack. The Chairman of the Internal Medicine Department learned of Patient 36 the next day and decided to seek a temporary restriction of Poliner's cath lab privileges to allow for an investigation. He neither conferred with nor notified Poliner before making this decision. Later the same day, the Chairman met with Poliner and presented him with the option of consenting to an abeyance of his privileges, or being suspended. This meeting was followed with a May 14 letter repeating Poliner's options, requesting his response by 5:00 p.m. that day, and informing him of how the investigation would move forward. Poliner requested more time to consult a lawyer, but this request was denied. Poliner then signed the abeyance. *Id.* at 372.

The same basic "agree or be suspended" proposition was placed before Poliner again on May 29 in the form of a letter requesting a voluntary extension of the abeyance. The letter advised Poliner that the extension was investigational in nature and that the ad hoc committee had reviewed 44 of his cases. The letter also stated that Poliner would have an opportunity to meet with the Internal Medicine Advisory Committee to respond to the ad hoc committee review. Poliner signed the extension request. *Id.* at 373.

The *Poliner* court evaluated whether the defendants were entitled to HCQIA immunity for the May 14 abeyance and the May 29 extension, which it treated as separate professional review actions. The court held that the defendants were entitled to immunity for the May 29 extension under both subsections (a) and (c) of 11112: "We conclude that the extension of the abeyance falls within section 11112(c)(2)'s curtilage, ***and in any event,*** **defendants imposed the restriction *after* procedures that were fair to Poliner under the circumstances.**" *Id.* at 382 (emphasis added).

The *Poliner* decision continues:

> Our review . . . further leads us to conclude that the extension was imposed "after such other procedures as are fair to the physician under the circumstances." The May 14 letter provided notice to Poliner of the peer review, which patient triggered it, the other patients then-of concern, that an ad hoc Committee review would be taken and a

> general description of how that review would be conducted . . . .

Id. at 383. The Court also noted that "Poliner and his lawyer knew what was happening and why before the extension."[7] *Id.*

As it did with the facts before it, there can be little doubt that the *Poliner* court would have found immunity for the Respondents in the present case under subsection (a) or (c), or both:

> It is difficult to conceive of a meaningfully different response from Defendants. Upon receipt of the ad hoc committee's review, it would have been untenable to restore full privileges while a hearing was scheduled and Poliner was given time to prepare. Had Defendants immediately held a hearing, there would have been no opportunity for Poliner to review the cases at issue, and we have no doubt that we would be considering whether such a hearing was "fair."

Id. at 383-384. The court concludes by reiterating: "Poliner received 'fair' procedures under these

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[7] Like the Fourth Circuit in the present case, the *Poliner* court also discussed the procedures afforded to Poliner after the May 29 extension in reaching its determination of whether that professional review action enjoyed immunity. Specifically, the court pointed out that Poliner was given an opportunity to meet with the Internal Medicine Advisory Committee in person to clarify any concerns. *Id.* at 372.

circumstances." *Id.*[8] The *Poliner* decision in no way promotes Wahi's arguments.

Sugarbaker v. SSM Health Care

The *Sugarbaker* decision invokes subsection (c)(2) as the primary grounds for finding that HCQIA immunity was properly granted – and, in doing so, holds the "imminent danger" requirement of subsection (c)(2) was easily satisfied. However, *Sugarbaker* also found the summary suspension justified because the hospital followed its medical staff bylaws, which permitted a precautionary suspension in the best interest of patient care, and because "the Executive Committee imposed the precautionary suspension only after the Surgery Review Committee's review of 24 of Dr. Sugarbaker's surgical cases raised concerns with respect to Dr. Sugarbaker's practice." *Sugarbaker v. SSM Health Care,* 190 F.3d 905, 917 (8th Cir. 1999). Only after these comments did the court add: "*Furthermore*, under the HCQIA's emergency provisions, summary suspensions . . . do not result in the loss of immunity 'where the failure to take such action may result in an imminent danger to the health of any

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[8] The *Poliner* decision further found: "The interplay of these provisions may work hardships on individual physicians, but the provisions reflect Congress' balancing of the significant interests of the physician and 'the public health ramifications of allowing incompetent physicians to practice while the slow wheels of justice grind.' Defendants satisfied the notice and hearing requirements, and no reasonable jury could conclude otherwise." *Poliner* at 384 (quoting *Rogers v. Columbia/HCA of Cent. La., Inc.*, 971 F. Supp. 229, 236 (W.D. La. 1997). "At the least, it is not our role to reweigh this judgment and balancing of interests by Congress." *Id.* at 385.

individual.'" *Id.* (citing 42 U.S.C. § 11112(c)(2)) (emphasis added).

A fair reading of *Sugarbaker* leads to the conclusion that the Eighth Circuit would have upheld the granting of summary judgment in the instant case under either subsection (a) or (c). Indeed, the court made it absolutely clear that it does not view HCQIA as a statute that should be strictly construed for the benefit of physicians seeking money damages:

> Even assuming arguendo that Dr. Sugarbaker has uncovered a statutory anomaly whereby various definitions contained in the HCQIA do not dovetail perfectly together, we are persuaded that Dr. Sugarbaker's selective reading of the statute cannot stand because it would undermine Congress' clear intent in enacting the statute. When the HCQIA is viewed as a whole, there is no doubt that Congress intended to improve the quality of our nation's healthcare by encouraging professional self-regulation. Accepting Dr. Sugarbaker's asserted statutory construction would seriously undermine Congress' intent . . . .

Id. at 917 (internal citations omitted). Nothing about the *Sugarbaker* decision conflicts with the Fourth Circuit's Opinion.

Fobbs v. Holy Cross Health System Corp.

Wahi's reliance on the *Fobbs* decision is puzzling. The *Fobbs* decision reinforces the Fourth Circuit's holding that immunity can be found under subsections (a) or (c). When read in conjunction with the published opinion from the United States District Court for the Eastern District of California (which it must be to make sense in the context of Wahi's Petition), the *Fobbs* decision clearly recognizes that the "other fair procedures" requirement of (a)(3) can be satisfied in a summary suspension context. *Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439 (9th Cir. 1994).

The peer review action at issue in *Fobbs* (the imposition of monitoring and consultation restraints on Fobbs' privileges to perform intra-abdominal laser surgery) was carried out without any notice or opportunity to be heard. *Fobbs v. Holy Cross Health Sys. Corp.*, 789 F.Supp. 1054, 1056 (S.D. Cal. 1992). In considering whether HCQIA immunity attached, the district court conducted an analysis under subsection (a)(1)-(4).

In its discussion of subsection (a)(3), the court notes "[p]laintiff also argues that defendants' manner of giving him notice that his privileges were restricted after the fact was not fair. In other words, he contends that, barring an emergency 'threatening imminent danger to the health of any individual,' process was due before defendants restricted his privileges." *Id.* at 1068 (emphasis added). *This is precisely Wahi's argument.* The district court disagreed: "There is no dispute that plaintiff was

given notice of the JRC [Judicial Review Committee] hearings. Therefore the question is whether or not the JRC hearings provided adequate procedure." *Id.*

The district court notes that the hospital's first two JRC proceedings were inadequate (Dr. Fobbs was not allowed to conduct voir dire of the JRC members), but places great weight on the fact that the hospital recognized this defect and agreed to provide a third hearing: "The court is satisfied that plaintiff was given the opportunity to adequate process, but that he opted not to exercise his right thereto." *Id.* Accordingly, it is clear that the district court looked at the totality of the circumstances and determined that the requirements of subsection (a)(3) were met.[9]

On appeal, the Ninth Circuit stated: "**We affirm the district court's order with the following addition to its opinion**, which affects section V.A.3. set forth on pages 1067 and 1068 relating to whether the summary monitoring restraints prior to any notice or hearing violated the HCQIA."[10] *Fobbs*, 29 F.3d 1439 at 1442 (emphasis added). The Ninth Circuit then discussed why the defendants were also entitled to immunity under subsection (c)(2), ultimately finding that "[t]he

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[9] The district court undertook a short discussion of (c)(2) as well upon defendants' argument that they were also entitled to immunity under that subsection. However,. the district court's analysis was primary one of whether the procedures provided were fair given the particular circumstances.

[10] Section V.A.3.a set forth on pages 1067 and 1068 relates to the district court's discussion regarding subsection (a)(3) found on those pages.

defendants had ample medical justification to take the steps. The district court correctly granted defendants HCQIA immunity with respect to the summary monitoring restrictions." *Id.* at 1443.

Importantly, the Ninth Circuit did not overturn or in any way criticize the district court's analysis under (a)(3), or its finding that fair procedures were afforded to Fobbs under the circumstances. The Ninth Circuit likewise did not correct or criticize the fact that the district court placed great weight upon the fact that Fobbs was provided with the opportunity for an appeal hearing, but declined to avail himself of that opportunity. Therefore, the only reasonable conclusion is that the Ninth Circuit would endorse both the reasoning and ultimate finding of the Fourth Circuit in this case.

Brader v. Allegheny General Hospital

Nothing about the *Brader* decision suggests that the Third Circuit would have reached a different result on the question of HCQIA immunity under the facts of this case. In its "adequate notice and hearing procedures" analysis, the *Brader* court found that the district court had incorrectly concluded that questions of fact existed concerning HCQIA immunity, because the evidence, taken in a light most favorable to Brader, did not rebut that he had received ample notice and hearing procedures. The court specifically held: "For us to conclude otherwise would be to tie the hands of hospitals and force every informal review activity of a doctor or a department into time-consuming and (depending on the outcome of the informal review) possibly

unnecessary formalized proceedings." *Brader v. Allegheny General Hospital*, 167 F.3d 832, 842 (3d Cir. 1999).

Although the *Brader* court did reference § 11112(c)(2) with respect to one professional review action taken on the spot, without any warning,[11] it did not treat all pre-hearing actions taken against Dr. Brader under subsection (c). Rather, it placed considerable weight on the fact that the hospital provided advance warning to Dr. Brader regarding actions to be taken and informed him of his rights at that time, including his right to *request a hearing*.[12] In conclusion, the court held:

> that Brader has failed to rebut the presumption that AGH met the requirements for immunity under the HCQIA. He has failed to come forth with

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[11] "The one instance in which AGH did not give Brader advance warning before an adverse action was taken was when Magovern summarily suspended his AAA privileges. However, Magovern's action is covered by § 11112(c), which provides that the procedures of § 11112(a)(3) do not preclude 'an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual'" *Brader*, 167 F.3d at 842 (citing 42 U.S.C. § 11112(c))

[12] "AGH gave Brader notice of each professional review action to be taken, informing him of his due process rights and the time in which he had to request a hearing. See § 11112(b)(1). The same day that the EC decided to recommend that Brader not be advanced to full staff and that all of his privileges be suspended, Sanzo, the Hospital president, wrote to Brader, informing him of his right to seek hearings on these recommendations." *Id.*

> sufficient evidence to allow a reasonable jury to conclude that the Hospital did not provide him with adequate and appropriate procedures, or that AGH did not act at all times in the reasonable belief that its actions would further quality health care. The grant of summary judgment to AGH will therefore be affirmed.

Id. at 843. The Fourth Circuit's Opinion does not conflict with the *Brader* decision.

C. Adopting Petitioner's Proposed Statutory Framework Would Not Change the Outcome of this Case Because the Respondents Are Also Entitled to Summary Judgment on the Question of HCQIA Immunity Under § 11112(c)(2)

Wahi argues that this case would be suitable for summary reversal because Respondents concede that they suspended him without a prior finding that he posed an imminent danger. (*See* Pet. at 2, 25-26). Not so. While Respondents do argue that they qualify for immunity pursuant to § 11112(a) and need not satisfy the "imminent danger" element of subsection (c)(2) to preserve that immunity -- Respondents do not concede that the requirements for immunity under subsection (c)(2) were not met.

Wahi's construction of subsection (c)(2) is tortured in several respects.[13] First, nothing about the subsection requires a "finding" of imminent danger as Wahi asserts. Thus, Wahi's primary argument that immunity cannot attach because the hospital did not pronounce him an "imminent danger" before suspending him is unavailing.[14] Subsection (c)(2) requires merely that the failure to act "*may* result in an imminent danger to the health of any individual." *Brader*, 167 F.3d at 842; *Sugarbaker*, 190 F.3d at 917; *Poliner*, 537 F.3d at 383; *Fobbs*, 29 F.3d at 1442-1443. No reasonable jury could conclude that a possibility of imminent danger did not exist in this case. Moreover, even if a finding or pronouncement of imminent danger was required, the suspension of Wahi's privileges was expressly handed down "in the best interest of patient care" -- in other words, to protect patients. This may be a distinction, but there is no real difference.

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[13] Wahi's arguments, taken as a whole, attempt to turn subsection (c)(2) on its head and create an additional hurdle to immunity. Subsection (c)(2) is clearly intended to provide additional protection to the peer review actor, its purpose being to forgive contemporaneous compliance with the fair procedures requirement of (a)(3) where immediate action is needed. It is intended to expand immunity, not limit it.

[14] Wahi's factual arguments concerning the application of subsection (c)(2) are also suspect. Wahi points out that he was allowed to care for two patients still in the hospital after his suspension, but ignores that this was only for one day, and that he was not permitted to perform additional surgeries. In any event, while it may be true that Dr. Wahi's continued care of two patients for another twenty-four hours did not present a risk of imminent harm to those patients, it does not follow that failing to suspend his privileges would not have created a risk of harm *to any individual*.

It strains the patience of reasonable minds to suggest that Congress did not intend for immunity to be afforded to peer review actions taken to address lack of compliance with restrictions placed on clinical privileges under the circumstances present here. A cardiothoracic surgeon with Wahi's troubled track record, operating outside the scope of his surgical privileges, undoubtedly presents the type of danger to patients that prompted the inclusion of a provision which grants immunity for "immediate" suspensions. This is also the type of danger to the public that HCQIA immunity was generally intended to stop by fostering vigorous peer review. Therefore, Respondents are entitled to summary judgment under a proper § 11112(c)(2) analysis.

II. THE OPINION DOES NOT DEEPEN OR WIDEN A RECOGNIZED CIRCUIT SPLIT OR CREATE A CONFLICT WITH THE FIRST AND TENTH CIRCUITS REGARDING WHETHER THE QUESTION OF HCQIA IMMUNITY CAN BE DECIDED BY A JURY

A. The Opinion Does Not Deepen or Widen a Recognized Circuit "Split"

Wahi argues incorrectly that the Opinion "deepens a pre-existing and acknowledged split" over the availability of jury trials to determine federal immunity. (Pet. at 26). The only conflict that arguably exists between the circuits regarding the "availability of jury trials" relates to who acts as the fact-finder on the immunity issue at trial. *See Singh v. Blue Cross/BlueShield of Mass., Inc.*, 308 F.3d 25,

33-36 (1st Cir. 2002). Having found that summary judgment was correctly granted, the Fourth Circuit did not reach this issue. Accordingly, the Opinion does not "deepen" or "widen" this conflict.

B. The Opinion Applies the Accepted Test for Summary Judgment under § 11112(a) and Does Not Establish a "No Jury" Standard

Wahi's indictment of the Opinion as effectively denying a jury trial is off the mark. The Fourth Circuit applied the well-settled summary judgment test to uphold the district court's determination that the Respondents were entitled to immunity under HCQIA. In fact, the Opinion applies precedent in the Fourth Circuit, citing to *Gabaldoni v. Washington County Hosp. Ass'n*, 250 F.3d 255, 260 (4th Cir. 2001) and *Imperial v. Suburban Hosp. Ass'n*, 37 F.3d 1026, 1030 (4th Cir. 1994) *Wahi, 562 F.3d* at 607.

Wahi argues that "[a]ccording to the Fourth Circuit, whether the procedures were 'fair * * * under the circumstances' was an exceedingly close question." (Pet. at 27). Wahi's arguments mischaracterize the Opinion and ignore the facts. While the Opinion acknowledges some arguable missteps, it makes no finding of wrongful conduct on the part of the Respondents. The opposite is true.

In considering Wahi's appeal of the district court's denial of his claims for *injunctive* relief (which are not subject to HCQIA immunity), the Fourth Circuit held that Wahi was entitled to no remedy because he had no "viable claim that CAMC

committed a wrong."[15] *Wahi*, 562 F.3d at 615. The Fourth Circuit concluded, therefore, that "Wahi has not made the requisite showing for any of the claims for which the district court determined the HCQIA immunity applied." *Id.* In short, the Fourth Circuit found that Wahi failed to demonstrate any wrongful conduct by the Respondents which would entitle him to any relief.

Wahi's claim that the Fourth Circuit found the question of whether fair procedures were afforded "exceedingly close" -- and simply "purported to break the tie" by invoking the presumption of immunity -- has no merit. Consistent with its own precedent, and the precedent of its sister circuits, the Opinion simply holds that Wahi failed to provide evidence upon which a reasonable jury could find that the procedures afforded to him were not fair under the circumstances. In doing so, it breaks no new ground, creates no conflict, and does not establish a "no jury" standard.

C. The Opinion Does Not Create A Conflict with Decisions of the First and Tenth Circuits

In support of his claim that the Opinion wrongfully denies him a jury trial on the question of immunity and creates a conflict between the circuits, Wahi cites to *Singh* and *Brown v. Presbyterian Health Care Services*, 101 F.3d 1324 (10th Cir. 1996). These cases do not support Wahi's arguments.

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[15] Petitioner has not challenged this finding as error in his Petition, nor has he addressed it in any manner.

Singh v. Blue Cross/Blue Shield of Mass.

As the Fourth Circuit did here, the *Singh* Court applied the well-established summary judgment test for HCQIA immunity under § 11112(a):

> In considering the defendants' motions for summary judgment based on HCQIA immunity, we ask the following: "might a reasonable jury, viewing the facts in the best light for [Dr. Singh], conclude that he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of *§ 11112(a)*?" *Austin, 979 F.2d at 734* (*Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*); see also *Bryan, 33 F.3d at 1333* (quoting this language from Austin). Therefore, Dr. Singh can overcome HCQIA immunity at the summary judgment stage only if he demonstrates that a reasonable jury could find that the defendants did not conduct the relevant peer review actions in accordance with one of the HCQIA standards.

Singh, 308 F.3d at 32.

Ironically, Dr. Singh (like Wahi here) argued that the award of summary judgment wrongly denied him a jury trial regarding the reasonableness issues under HCQIA. The *Singh* court soundly rejected this argument:

In asserting that the district court deprived him of his right to a jury trial with its summary judgment ruling, Dr. Singh overlooks the import of Congress's adoption of objective standards for the HCQIA immunity determination. Given the objective standards set forth in the statute, reasonableness determinations under the HCQIA may often become legal determinations appropriate for resolution by the judge at summary judgment. If there are no genuine disputes over material historical facts, and if the evidence of reasonableness within the meaning of the HCQIA is so one-sided that no reasonable jury could find that the defendant health care entity failed to meet the HCQIA standards, the entry of summary judgment does no violence to the plaintiff's right to a jury trial.[16]

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16 The *Singh* Court further pointed out:

"Congress unmistakably recognized the usefulness of summary judgment proceedings in resolving immunity issues under the HCQIA prior to trial" and that:

> The Supreme Court has repeatedly emphasized that the qualified immunity determination should be made as soon as possible during the course of litigation. See *Id. at 815-16* (referring to the Court's holding in *Butz v. Economou, 438 U.S. 478, 508, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978)*, that "insubstantial claims should not proceed to trial"). Like the Supreme Court in Harlow, Congress indicated in the legislative history of the HCQIA that its immunity determinations should also be made expeditiously See H R. Rep. No 99-903, at 12, reprinted in 1986 U.S.C.C A.N 6384, 6394 (stating that "these provisions [are intended to]

Id. at 33-36.

Applying this standard, the First Circuit affirmed the district court's finding of immunity for the defendant insurer and physician auditor. The court concluded that no reasonable jury could find that the defendants failed to meet the HCQIA standards. Nothing about the *Singh* decision suggests that the First Circuit would have reached a different result in this case.

Brown v. Presbyterian Healthcare Services

In *Brown*, the Tenth Circuit affirmed the district court's refusal to grant judgment as a matter of law on the question of HCQIA immunity following a trial resulting in a verdict against the defendants, holding that the evidence presented a question of fact for a jury on § 11112(a)(2). *Brown*, 101 F.3d at 1327-36. The Brown decision, like all HCQIA immunity determinations, was fact-driven. Although (based upon the facts before it) the Tenth Circuit reached a different result, it applied the same well-accepted legal test for determining whether judgment as a matter of law was warranted on the question of HCQIA immunity under § 11112 (a):

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allow defendants to file motions to resolve the issue of immunity in as expeditious a manner as possible," and anticipating that courts would "determine at an early stage of litigation that the defendant has met the *[section 11112(a)]* standards").

Singh, 308 F.3d at 35-36.

> Thus, in determining whether a peer review participant is immune under the Health Care Quality Improvement Act, the proper inquiry . . . is whether Dr. Brown has provided sufficient evidence to permit a jury to find she has overcome, by a preponderance of the evidence, any of the four statutory elements required for immunity under 42 U.S.C. § 11112(a). See, e.g., Austin, 979 F.2d at 734.

Id. at 1334 n.9.

While the *Brown* decision is not directly on point -- because the *Brown* Court was looking at subsection (a)(2) (which requires "reasonable effort to obtain the facts of the matter") instead of (a)(3) -- the *Brown* court applied the same legal standards applicable generally to questions of HCQIA immunity under § 11112(a). Given a very different set of facts, it reached a different result.

Neither *Singh* nor *Brown* holds that a jury trial is *required* on the issue of immunity under HCQIA. In fact, *Singh* did not allow the question of immunity to reach a jury. It is clear under both decisions that the determination of whether summary judgment is properly granted is driven by the facts. It is also clear that summary judgment is warranted unless, as in *Brown*, the plaintiff presents sufficient evidence for a reasonable jury to find that the action taken failed to meet at least one of the statutory elements required for immunity under subsection (a). The Fourth Circuit simply found that Wahi failed to present such evidence. Thus, nothing

in the Opinion conflicts with the holdings in either *Singh* or *Brown*.

CONCLUSION

For more than two decades, HCQIA has fostered "effective professional peer review" by providing immunity from "the threat of private money damage liability" to peer review bodies and participants who investigate and discipline troubled physicians. Having mandated in the Act that disciplined physicians be reported to a national database, Congress predicted correctly that when "faced with the certainty that they can no longer hide their past records, physicians facing disciplinary action will feel compelled to challenge vigorously any action taken against them" and file antitrust lawsuits -- *precisely as the Petitioner has done here*. H.R. Rep. 99-903, *reprinted in* 1986 U.S.C.C.A.N. at 6385. Congress further believed that those who are "sufficiently fearful of the threat of litigation will simply not do meaningful peer review," and deemed it essential, therefore, that immunity from suit be provided to peer review participants. *Id.* To this end, HCQIA provides immunity from civil damages if a professional review action meets the reasonableness standards specified in § 11112(a), and further provides a presumption that a peer review action met the standards of § 11112(a) which must be rebutted by a preponderance of the evidence. § 11111, § 11112(a)(4).

The Fourth Circuit applied the established legal test to reach its determination that Wahi failed to rebut the presumption that the Respondents were

entitled to HCQIA immunity as a matter of law pursuant to § 11112(a). The Opinion is well-reasoned and carries out the clear intent of HCQIA by protecting from civil damages those who carry out peer review. In doing so, it breaks no new ground and creates no conflict with the decision of another circuit. Accordingly, there is no compelling reason for the Petition to be granted.

Respectfully Submitted,

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